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Supreme Court, U.S.
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No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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RULE 29.6 STATEMENT

Petitioner Robert R. Krilich, Sr. is a private party.

PETITION FOR REHEARING

On October 14, 2003, this Court issued an Order denying the petition for a writ of certiorari filed by petitioner Robert R. Krilich, Sr. On the same day, this Court granted certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in No. 03-44, *Sabri* v. *United States*. Because of the close relationship between the second Question Presented in petitioner's case and the Question Presented in *Sabri*, petitioner respectfully requests that this Court hold this rehearing petition pending the decision in *Sabri* and then dispose of it as appropriate. Because petitioner stands convicted and imprisoned, no prejudice to the government could result.

BACKGROUND

18 U.S.C. 1014, entitled "Loan and credit applications generally," makes it a crime to "knowingly make[ ] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." Petitioner was convicted of conspiracy to violate Section 1014 in connection with his withdrawal of funds – raised from the sale of Industrial Revenue Bonds to third parties to finance petitioner's construction of housing developments – held in trust by various banks.

On appeal, the Seventh Circuit acknowledged that petitioner's withdrawal of the trust funds were not "lending transactions," but it nonetheless held that Section 1014 criminalized petitioner's conduct. Indeed, the decision below effectively extended Section 1014 to encompass virtually any "false statement" to a banking institution, notwithstanding that state law also proscribes fraud on a trust. On that view, no federally insured funds, *and thus no particular nexus to a federal interest*, need be shown to establish a violation of

Section 1014. In so holding, the Seventh Circuit explicitly declined to follow the Fifth Circuit's contrary holding in *United States* v. *Devoll*, 39 F.3d 575 (1994), cert. denied, 514 U.S. 1067 (1995), that Section 1014 "applies only to statements made to obtain loans or other extensions of credit." Judge Ripple dissented with regard to Section 1014, agreeing with the Fifth Circuit that the statute "applies only to *lending activities* by the financial institutions protected by the statute." Pet. App. 27a (emphasis added).

ARGUMENT

In No. 03-44, *Sabri* v. *United States*, the petitioner was indicted in federal district court in Minnesota on charges that he allegedly bribed a local government official. Petitioner was charged under 18 U.S.C. 666, which criminalizes bribery with regard to state or local governments when such governments receive federal funding; like the law of every other state, Minnesota law also criminalizes bribery. Agreeing with the Fifth, Sixth, and Seventh Circuits, but in conflict with the Second and Third Circuits, the Eighth Circuit held that Section 666 does not require an indictment to allege any relationship between the alleged bribe and the federal funding. 326 F.3d 937, 939-940 (2003). Moreover, the court held, the Necessary and Proper Clause empowered Congress to enact Section 666 because the statute was "rationally related" to "achieving the efficacious expenditure of federal funds" "by policing the integrity of the entire organization that receives federal benefits." *Id.* at 950. Explaining that this Court's decisions in *Printz* v. *United States*, 521 U.S. 898 (1997), and *Alden* v. *Maine*, 527 U.S. 706 (1999), "teach us that * * * [f]ederal laws that usurp the traditional domain of state authority are * * * not 'proper,'" Judge Bye dissented from the panel's holding with regard to the Necessary and Proper Clause. *Id.* at 954-957.

Although petitioner's case presents the issue of the proper construction of Section 1014, relating to false statements to

financial institutions, while the proper construction of Section 666, relating to bribery, is at issue in *Sabri*, both cases present the same frequently recurring question of fundamental importance – *viz.*, the proper scope of federal criminal law in areas traditionally regulated by the states. Indeed, the construction of each statute revolves around the same basic inquiry: whether a statute expressly intended to protect a federal interest should criminalize conduct that is properly chargeable under state law and has *no* impact on the federal interest at stake. (At trial, the district court instructed the jury that it "makes no difference whose money it was that was being disbursed by the bank. And it makes no difference whether or not the bank was injured as a result of any conduct of the defendant or anyone else." Tr. 151. On remand, petitioner would be able to demonstrate that no federal bank funds were at risk. See Reply Br. at 7-8.)

In particular, if this Court rules for the defendant in *Sabri*, it likely will do so on the basis of a canon of construction that if Congress intends to extend the reach of federal criminal law into the traditional domain of the states, and specifically into a domain in which there is no distinct federal interest, Congress must do so expressly. Such a "plain statement" rule would have considerable consequences for petitioner in this case, as it would likely cause the Seventh Circuit to re-evaluate its divided panel opinion. Neither Section 666 (at issue in *Sabri*) nor Section 1014 (at issue in petitioner's case) contains a clear statement of an intent by Congress to reach conduct that presents no direct federal interest. Indeed, that is precisely the ground on which the Fifth Circuit in *Devoll* adopted its contrary construction of Section 1014. 39 F.3d at 580.

This case accordingly presents the rare circumstance in which rehearing may be appropriate. The Court has confronted a number of cases in which it has denied certiorari but a subsequent merits ruling calls the court of appeals' judgment into question. The Court's practice in such cir-

cumstances is to grant rehearing, vacate the order denying certiorari, vacate the court of appeals' judgment, and remand the case for further consideration. See *Friend* v. *United States*, 517 U.S. 1152 (1996); *Fuentes* v. *United States*, 516 U.S. 1022 (1995); *Adams* v. *Evatt*, 511 U.S. 1001 (1994); *Hitchcock* v. *Florida*, 505 U.S. 1215 (1992); *Booker* v. *Mississippi*, 472 U.S. 1023 (1985); *Simmons* v. *Sea-Land Services, Inc.*, 462 U.S. 1114 (1983); *Florida* v. *Rodriguez*, 461 U.S. 940 (1983); *Harris* v. *Reederei*, 451 U.S. 965 (1981).

CONCLUSION

The petition for rehearing should be held pending the disposition of No. 03-44, *Sabri* v. *United States*, and then disposed of accordingly.

Respectfully submitted.

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NOVEMBER 2003

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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Counsel for Petitioner